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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MacWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

PETITIONER'S REPLY BRIEF FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 4, 1975

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Respondents boldly describe the issue prescribed as "the narrowest and least significant" that could be raised under the securities laws. We submit that it goes to the very heart and vital core of § 16(b). In enacting that statute, Congress recognized that the evil of insider speculation can be stemmed only by a rigorous prohibition resting on an objective and readily applicable criterion. The six-month holding period of 16(b) is the criterion chosen by Congress. It is the pivot on which the statutory system turns. Any erosion of this crucial statutory safeguard is bound to undermine the legislative scheme so carefully designed by Congress for the protection of investors.*

* That § 16(b) represents a fundamental policy decision of Congress is illustrated by the fact that this Court has four times granted review of it. *Foremost-McKesson, Inc.* v. *Provident Securities Co.*, —— U.S. —— 95 S.Ct. 1117, 43 L. Ed. 2d 392 (1975); *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 405 U.S. 1064 (1972); *Reliance Electric Co.* v. *Emerson Electric Co.*, 401 U.S. 1008 (1971); *Blau* v. *Lehman*, 366 U.S. 902 (1961).

The purpose of the provision was "to protect the interests of the public" by making difficult or impossible the use of advance corporate information; *Senate Committee on Banking & Currency*, S.R. 792, 73rd Cong., 2nd Sess. (1934), p. 9 (incorrectly referenced as *Senate Committee on Banking & Currency*, S.R. 792, 73rd Cong., 2nd Sess. (1934) p. 6 at pp. 7-8 of our petition).

The decision below should be reviewed not only because of its inroad on the statutory six-month period but, in addition, because of the wholly unacceptable method by which it achieved that inroad. The Court of Appeals decided the question before it * without casting so much as a glance at the merits of the issue. Indeed, both the Court of Appeals and the District Court took the greatest care *not* to expres agreement with the *Stella* ruling. Judge Gurfein in the District Court stated in no uncertain terms that, but for *stare decisis,* he might well have accepted plaintiff's position (Appendix 6a);** and the Court of Appeals, by adopting Judge Gurfein's opinion (Appendix 2a), adopted also this statement. The Court of Appeals thus followed *Stella* not because it thought that *Stella* was correctly decided, but regardless of whether *Stella* was right or wrong.

Such blind adherence by the Court of Appeals to a District Court ruling (which was mere dictum at that) flies in the face of an appellate tribunal's elementary duty to review the decisions of lower courts, not to accept them uncritically. Respondents have been unable to adduce a single precedent in which an appellate court deemed itself bound, by *stare decisis,* to follow the ruling of a lower court. The Court below, by its complete disregard of the merits, thus truly abdicated its most fundamental appellate duties. Before the legislative scheme enacted by Congress is thus thrown to the winds, it should receive consideration by at least one appellate court. Since the Court below withheld

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* Respondents (Brief p. 4) ascribe to us the absurd contention that the Court of Appeals failed to decide the question. Of course the Court did decide it by affirming the dismissal of the complaint. The trouble lies in the *method* by which the Court reached its decision.

** The height of enthusiasm Judge Gurfein could work up for *Stella* was that he found it not "clearly in error" (Appendix 6a).

any consideration at all, the due administration of justice requires review by this Court.

Respondents' contention (Brief p. 3) that *Stella* has been "settled law" since it was decided in 1955 must be made with tongue in cheek. The law is "settled" by this Court, not by the isolated dictum of a single district judge. Respondents' suggestion (Brief, pp. 3, 5) that Congress and the SEC approved the *Stella* rule by failing to alter it borders on the absurd. The SEC had no power to alter or overrule *Stella;* and Congress certainly cannot be expected to move the legislative machinery whenever a district court renders an erroneous decision; the correction of such errors is, after all, entrusted to the higher courts.* Finally,

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* It would be highly unrealistic to "expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation [of a statute];" *Jones* v. *Liberty Glass Co.,* 332 U.S. 524 (1947). Even in overruling its own decisions, this Court deems it "at best treacherous to find in congressional silence alone the adoption of a controlling rule of law * * * the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision;" *Boys Markets* v. *Retail Clerks Union,* 398 U.S. 235, 241-42 (1970); *NLRB* v. *Plasterers' Local Union,* 404 U.S. 116, 129-30 (1971).

As far as the Securities and Exchange Commission is concerned it is simply incorrect to say that it agrees with *Stella.*

SEC Rule 16a-1(e), 17 CFR 240.16a-1(e) deals with a director who buys securities while still in office but sells them after he ceases being a director; he must report the sale if it "shall occur within six months after" the purchase. The Commission thus considers the applicable period to be six full months, not one or two days less. It can hardly be suggested that, in framing these Rules, the Commission failed to focus on the precise boundaries of the statutory period. Since Rule 16a-1(e) was proposed by the Commission on April 17, 1969, Sec. Exch. Act Release No. 8574, '67-'69 CCH Fed. Sec. L. Rep. ¶ 77,684, and became effective October 20, 1969, Sec. Exch. Act Release No. 8697, '69-'70 CCH Fed. Sec. L. Rep. ¶ 77,740, the Commission obviously was aware of the *Stella* case. The only realistic conclusion is that the Commission has never viewed the *Stella* dictum as a correct statement of the law.

it is nothing short of misleading to say, as respondents do (Brief p. 5), that the *Stella* rule "has been followed by every court which has considered it"—when the District Court for Northern Oklahoma is the only court that ever followed it.*

One of the leading draftsmen of the statute, Mr. Pecora, explained to Congress that an insider may avoid liability provided his transactions are "more than 6 months apart" (Petition p. 10). This Court, in *Reliance Electric,* said precisely the same ("more than six months"; Pet. p. 12). Plainly this was not, as respondents assert (Brief p. 5), "loose" language used to avoid the literal rendition of a "clumsy" statutory phrase; for if this Court, and Mr. Pecora, had agreed with *Stella,* they could, without the least clumsiness, simply have omitted the words "more than".

And what of the statute itself which, in so many words, imposes liability irrespective of the insider's intention to hold the securities purchased "for a period exceeding six months"? Even respondents dare not call the statutory language "loose"; so they take the next best course and simply ignore the clause, in the hope that the Court will likewise overlook it. They accord the same silent treatment to the SEC regulations (Pet. p. 13), which so clearly reflect the Commission's view that the statutory holding period is six full months.

Respondents' implicit contention (adopted by the Court of Appeals) is that an error of one or two days in measuring the statutory period is not important enough to merit

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* See *Morales* v. *Reading & Bates O. D. Co.,* 392 F. Supp. 41 (N.D. Okla. 1975). Respondents' other authority, *Rheem Mfg. Co.* v. *Rheem,* 295 F.2d 473 (9th Cir. 1961), certainly did not follow *Stella.* The Ninth Circuit, although referring to *Stella* in a footnote (p. 473, n. 3), based its decision on a ground wholly unrelated to *Stella.*

this Court's attention. However, where important considerations of policy are concerned, this Court has often devoted its attention to the precise measurement—down to the very day and hour—of time periods defined by Congress, state legislatures and constitutions, and courts. *Jones & Laughlin Steel Corp.* v. *Gridiron Steel Co.*, 382 U.S. 32 (1965) (time to appeal); *Berman* v. *United States*, 378 U.S. 530 (1964) (time to appeal); *Burnet* v. *Willingham Loan & Trust Co.*, 282 U.S. 437 (1931) (time to assess taxes); *City of Owensboro* v. *Owensboro Water Works Co.*, 243 U.S. 166, 171-72 (1917) (time of commencement of renewal period of corporate existence); *Taylor* v. *Brown*, 147 U.S. 640 (1893) (period of restraints on alienation on land held by Indians); *Town of Louisville* v. *Portsmouth Savings Bank*, 104 U.S. 469 (1881) (effective time of state constitutional amendment); *Sheets* v. *Selden's Lessee*, 69 U.S. 177 (1865) (definition of "month"); *Griffith* v. *Bogert*, 59 U.S. 158 (1856) (period of restraints on alienation against decedents' estates).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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